

71 822

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

RECEIVED
APR 05 2014
SC Court of Appeals

Toyota of Greenville, Inc. Appellant,

v.

David Carroll Respondent.

PETITION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS OF SOUTH CAROLINA:

Appellant Toyota of Greenville, Inc., by and through its undersigned counsel, and pursuant to Rule 221 of the South Carolina Rules of Appellate Procedure, respectfully petitions this Court for a rehearing of the above-captioned matter, with an appellate number of 2013-002599, an opinion on which was filed March 24, 2014. This Opinion has the effect of finally deciding Appellants' Appeal. The grounds of this Petition are as follows:

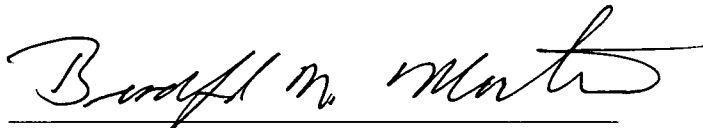
(1) The lower court's Order finally determines a substantial matter and is appealable pursuant to S.C. Code Ann. § 14-3-330(1) as Appellant's right to have the Respondent proceed against it only in an individual capacity, rather than in a representative capacity, is a substantial right forming part of the cause of action, and the court's deciding a question of fact and applying that fact to the law makes this a final judgment.

(2) This appeal is being taken from the lower court's Order finding that Respondent is acting as a private attorney general and not from the separate finding granting arbitration.

(3) The lower court's Order fits within S.C. Code Ann. § 15-48-200(A) as the Order denied the ability to arbitrate in an individual capacity and was a decree entered pursuant to the provisions of the Uniform Arbitration Act from which an appeal can be taken.

(4) There are compelling reasons for this Court to consider the merits of the appeal, including a novel issue of law being present, judicial economy, and the lower court's imposition of group representation on the arbitration process, which has the same effect as denying the application for bilateral arbitration.

Respectfully submitted,



Bradford N. Martin, Esq. (SC Bar No. 3658)

Laura W. H. Teer, Esq. (SC Bar No. 16698)

Brook Bristow, Esq. (SC Bar No. 76038)

BRADFORD N. MARTIN & ASSOCIATES, PA

Post Office Box 10410

Greenville, South Carolina 29603

(864) 552-9990

April 7, 2014

**ATTORNEYS FOR APPELLANT TOYOTA
OF GREENVILLE, INC.**

RECEIVED
APR 08 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

Toyota of Greenville, Inc. Appellant,

v.

David Carroll Respondent.

MEMORANDUM IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

Appellant submits this Memorandum in Support of its Petition for Rehearing and would respectfully show the following:

I. THE COURT MISAPPREHENDED APPLICABLE LAW IN FAILING TO FIND THAT THE ORDER FINALLY DETERMINES A SUBSTANTIAL MATTER AND IS APPEALABLE PURSUANT TO § 14-3-330(1)¹

Intermediate orders involving the merits may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(1).² The lower court did not simply order the underlying case to go to arbitration; the lower court additionally made a separate finding that Respondent is a private

¹ The Court also misapprehended applicable law in finding that the Order does not fit within § 15-48-200(A). As set forth more fully in Appellant's Return to Respondent's Motion to Dismiss, Appellant is being denied its right to arbitrate with Respondent alone, which is immediately appealable under § 15-48-200(a)(1). Additionally, the lower court's finding that Respondent can proceed in bilateral arbitration as a private attorney general is a decree entered pursuant to the provisions of the Uniform Arbitration Act from which an appeal can be taken under § 15-48-200(a)(6).

² An order which involves the merits is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct.App.2006) (quoting *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). See also Jean Hoefler Toal, et al., *Appellate Practice in South Carolina*, 87 (2d ed. 2002).

attorney general and can act in that capacity. This could radically change the nature of the arbitration with Respondent representing all South Carolinians, rather than resolve his dispute one-on-one as he agreed. The court's deciding a question of fact and applying that fact to the law makes this a final judgment. *See Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942).

Additionally, interlocutory orders affecting a substantial right may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(2). Orders affecting a substantial right "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." *Mid-State Distribs., Inc.*, 310 S.C. at 335 n.4, 426 S.E.2d at 780 n.4. The lower court's ruling as to Respondent acting as a private attorney general has the effect of striking out the defense that Respondent can only act in an individual capacity.

This Court correctly cites *Carolina Care Plan, Inc. v. United Health Care Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004) in its opinion; however it misapplies the facts to this case. In *Carolina Care Plan*, the Supreme Court was presented with two questions: 1) whether the trial court erred in dismissing causes of action for fraud, unconscionability, and a violation of public policy pursuant to Rule 12(b)(6); and 2) whether the trial court err in staying the remaining claims pending arbitration. The Supreme Court found that only the order compelling arbitration and staying the proceedings was not immediately appealable. *Id.* at 558, 606 S.E.2d at 759.

Another analogous case is *Episcopal Housing Corp. v. Fed. Ins. Co.*, 273 S.C. 181, 255 S.E.2d 451 (1979) in which the consolidation of two appeals was a separate issue from the granting of the arbitration. The South Carolina Supreme Court accepted the appeal in that case.

This is what Appellant requests this Court to do with the private attorney general issue which is separate from the granting of arbitration.³

In the present case, Appellant has appealed the trial court's order that Respondent is acting as a private attorney general and not the order compelling arbitration. Therefore, the Court should reconsider and deny the Motion to Dismiss.

II. THE COURT MISAPPREHENDED APPLICABLE LAW IN FAILING TO FIND A COMPELLING REASON TO CONSIDER THE MERITS OF THE APPEAL

The Court misapprehended applicable law in finding that this is an appeal from an Order compelling arbitration. The Court states in its opinion:

Finally, because the scope of arbitration is determined by the arbitration agreement, and because the United States Supreme Court recently determined the enforceability of arbitration agreements cannot be conditioned upon the availability of classwide arbitration procedures, we do not find a compelling reason to consider the merits of this appeal. . . .

It is precisely because the scope of arbitration is determined by the arbitration agreement that this Court should consider the merits of this appeal. The lower court has interjected a finding not contained in the arbitration agreement and has changed the relationship of the parties to one another. *See Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960) (an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties."). Imposing group representation on the arbitration process has the same effect as denying the application for bilateral arbitration.

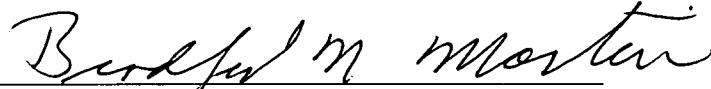
³ Although the issue before the Court is not the granting of arbitration, this Court overlooks the fact that immediate appeals have been granted in cases where arbitration was compelled. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct.App.2013); *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003).

Appellant agrees that the enforceability of arbitration agreements should not be conditioned upon the availability of classwide arbitration procedures. The purpose of this appeal is to ask this Court to address the lower court's imposition of Respondent acting in a representative capacity into an arbitration in which the parties only agreed to act on their own behalf. This is a novel issue affecting a substantial right (and many parties) that should be heard in the interest of judicial economy.⁴

CONCLUSION

Appellant is seeking to appeal the narrow issue of the lower court's finding that Respondent is a private attorney general and can proceed in that capacity in a bilateral arbitration when his arbitration clause allows him to arbitrate only in an individual capacity. For the foregoing reasons, Appellant's petition should be granted and the appeal allowed to proceed.

April 7, 2014



Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
Brook Bristow, Esq. (SC Bar No. 76038)
BRADFORD N. MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603
(864) 552-9990

**ATTORNEYS FOR APPELLANT TOYOTA
OF GREENVILLE, INC.**

⁴ Moreover, this issue presents a novel question of law which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar. *Salmonsén v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008). The issue presented is capable of repetition and needs to be addressed, making it appropriate for the Court to review. See *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003). Hundreds of defendants in *Herron* were involuntarily dismissed from that case after being named as Defendants in the Aiken County case of *Adams, et al. v. Action Ford, et al.* No. 2007-CP-02-1232. The lower court has both cases under a complex case designation and the same issue will be raised by many of the defendants in *Adams* with arbitration provisions.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge.

Case No. 2012-CP-23-7156

RECEIVED
APR 08 2014
SC Court of Appeals

Toyota of Greenville, Inc. Appellant,

v.

David Carroll Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing and Memorandum in Support by depositing a copy in the U.S. Mail, postage prepaid, on April 7, 2014, addressed to Respondent's attorneys, Terry E. Richardson, Jr., Esq., Brady R. Thomas, Esq., James David Butler, Esq., Richardson, Patrick, Westbrook & Brickman, LLC, P.O. Box 1368, Barnwell, South Carolina 29812; A. Camden Lewis, Esq., Lewis & Babcock, LLP, PO Box 11208, Columbia, SC 29211; Gedney M. Howe, III, Esq., Gedney M. Howe, III, PA, Post Office Box 1034, Charleston, South Carolina 29402; Michael E. Spears, Esq., Michael E. Spears, PA, Post Office Box 5806, Spartanburg, South Carolina 29304; and Richard A. Harpootlian, Esq., Richard A. Harpootlian, PA, Post Office Box 1090, Columbia, South Carolina 29211.

April 7, 2014

Bradford N. Martin

Bradford N. Martin, SC Bar #3658

Laura W. H. Teer, SC Bar #16698

Brook Bristow, SC Bar # 76038

BRADFORD NEAL MARTIN & ASSOCIATES, PA

Post Office Box 10410

Greenville, South Carolina 29603

864.552.9990

BRADFORD NEAL MARTIN & ASSOCIATES, PA

ATTORNEYS AT LAW

201 West McBee Avenue, Suite 302
Post Office Box 10410 (29603)
Greenville, South Carolina 29601

bmartin@bnmlaw.com
Phone: (864) 552-9990
FAX: (864) 552-9992

April 7, 2014

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED
APR 08 2014
SC Court of Appeals

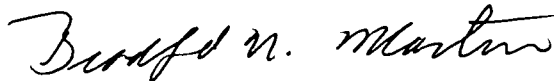
Re: *David Carroll v. Toyota of Greenville, Inc.*
C/A No.: 2012-CP-23-7156
SC Court of Appeals Case No. 2013-002599

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant's Petition for Rehearing and Memorandum in Support, Proof of Service, and our firm's check in the amount of \$25.00 for filing fees in the above matter. Please file with the records of your Court and return a stamped copy to me in the enclosed envelope.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Bradford N. Martin

/pm
Enclosures

cc: Terry E. Richardson, Jr., Esq.
Brady R. Thomas, Esq.
James David Butler, Esq.
A. Cam Lewis, Esq.
Gedney M. Howe, III, Esq.
Richard Harpootlian, Esq.
Michael E. Spears, Esq.